IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 639 OF 2003

IN

SUMMARY SUIT NO. 3563 OF 2002

Smt.Sandhya Pramod Patel .. Plaintiff

versus

M/s.Lalit Constructions & ors. .. Defendants

...

Mr.L.H. Patel i/b K.J. Hakani for the plaintiff.

Mr.S.I. Jaykar for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 4th April 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. This Summons for Judgement is taken out by the plaintiff in a suit for recovery of hire charges due and payable by the defendant.

3. By an agreement dated 10th September 2000 (Exhibit-A to the plaint) the plaintiff gave and defendant took on hire certain plant and machinery and agreed to pay hire charged at Rs.40,000/- per month. The defendant failed and neglected to make the payment. The plaintiff has filed this suit for recovery of the hire charges.

4. By filing an affidavit in reply, the defendants have contested the claim. The defendant no.2 who is the partner of defendant no.1 has filed the affidavit in reply on behalf of himself and defendant no.1 and its other partners viz. defendant nos.3 and 4.

5. The learned counsel for the defendants firstly submits that the defendant filed their appearance on 12th December 2002 and Summons for Judgement was taken out on 24th July 2003 i.e. after a lapse of six months and therefore, the defendants are entitled to an unconditional leave. A Division Bench of this Court has held that the mere fact that the Summons for Judgement has not been taken out within a period of six months would not by itself entitle the

defendant to an unconditional leave but that may be one of the circumstances which may be taken into consideration while considering the defence of the defendants.

6. The learned counsel for the defendant then submits that agreement Exhibit-A to the plaint was not to be acted upon. The defendants have admitted that defendant no.2 in the capacity as a partner of defendant no.1 has signed the said agreement. However, what is contended is that the agreement was not real but there were some different transactions between plaintiff’s husband and defendant no.1. Under section 91/92 of the Evidence Act, the defendants are not entitled to adduce evidence contrary to the terms and conditions of the written agreement. Hence,after having admitted execution of the agreement, the contention that the real intention of the parties was something else does not give rise to any triable issue or a defence of substance.

7. In the circumstances, the defendants can only be granted conditional leave to defend the suit. Considering the facts and circumstances of the case, it would be appropriate that the defendants be

directed to deposit a sum of Rs.5,00,000/- in the Court as a condition to leave to defend. Accordingly, the defendants are granted conditional leave to defend subject to their depositing in the Court a sum of Rs.5,00,000/- within a period of 8 weeks. In the event the defendants deposits the amount, the same shall be invested in any nationalised bank of the choice of the defendant, if such choice is indicated at the time of deposit or else in the Bank of India, Main Branch, Fort.

8. On deposit of the money, the suit shall stand transferred to the list of commercial causes. The defendant to file written statement within a period of two months.

D.G. KARNIK, J